**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED APRIL 12, 2004**

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

No. 03-3559

United States of America,

Appellee,

v.

Jim Guy Tucker,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas

Appellant's motion under 28 U.S.C. section 2244 for permission to file a Rule 60 motion in the district court has been considered by the court and is denied.

The stay of proceedings previously granted is set aside. Appellant's opening brief and appendix are due May 14, 2004. Appellee's brief is now due June 14, 2004. The reply brief (optional) is now due June 28, 2004.

April 12, 2004

Order Entered at the Direction of the Court:
s/ Michael E. Gaus
Clerk, U.S. Court of Appeals, Eighth Circuit

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED AUGUST 28, 2003 AND FILED AUGUST 29, 2003**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. 4:95CR00117-001 SMR
No. 4:03CV00118

UNITED STATES OF AMERICA

PLAINTIFF

vs.

JIM GUY TUCKER

DEFENDANT

**ORDER**

Presently before the Court is Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc No. 341). The Government has filed a Response (Doc. No. 347), and Defendant has filed a Reply (Doc. No. 348). For the reasons stated below, the motion is denied.

**Facts**

The facts of this case, as described by the Eighth Circuit, are as follows:

*Appendix B*

Former Arkansas Governor Jim Guy Tucker pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income tax in violation of 18 U.S.C. § 371. The plea agreement provided that Tucker's sentence would include a term of probation, a fine, and the payment of restitution based on Tucker's share of "the loss sustained by the United States as a result of the offense."

* * *

We will briefly describe the complex transactions at issue, based upon fact statements in the PSR to which Tucker did not object, plus the sentencing hearing testimony of his long-time accountant. In 1987, Tucker and William Marks undertook a joint venture in the cable television business, agreeing to divide their profits equally. At the time, Marks owned 18% of Planned Cable Systems (PCS), a subchapter C corporation that owned several cable television systems. Tucker owned 100% of Cable Management Inc. (CMI), an Arkansas corporation that had elected subchapter S status in May 1985.* In June 1987, Marks and Tucker acquired the remaining shares

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* Briefly stated, under the Internal Revenue Code, most incorporated businesses are subchapter C corporations, meaning that their activities are taxed at the corporate level. A subchapter S corporation is a qualified corporation that elects to have its business activities taxed only at the shareholder level. See 26 U.S.C. §§ 1361-1379.

of PCS from a third party for $6,000,000 and merged PCS into CMI, with Marks acquiring a 50% interest in CMI from Tucker.

One of PCS's businesses was Plantation Cable System, a Florida cable operator. In August 1987, an unrelated third party agreed to purchase Plantation's assets from CMI for $15 million. When advised that this transaction would realize substantial taxable gain, Tucker, Marks, and a tax attorney devised a series of sham transactions to minimize their tax liability. They reversed the PCS-CMI merger and transferred the PCS assets into LMS, falsely representing that Tucker's only interest in that corporation was as a substantial secured creditor. They then put LMS into bankruptcy. Aided by further misrepresentations to the bankruptcy court, they had the Plantation assets transferred to Tucker in exchange for his secured debt. In January 1988, Tucker sold the Plantation assets to the unrelated buyer for $14.75 million. Tucker received $ 11.75 million of the purchase price; and Marks received $3 million in the form of non-compete payments. In his 1988 individual tax return filed in early 1989, Tucker claimed a stepped-up basis in the Plantation assets and paid tax on a reported capital gain of $4,466,977. CMI paid no corporate-level capital gains tax on the sale of the Plantation assets.

*United States v Tucker*, 217 F.3d 960, 961-62 (8th Cir. 2000) (footnote in original). Defendant appealed the amount of

restitution included in this Court's sentence. This Court's decision on that issue was reversed, and Defendant's case was remanded for the purpose of resentencing with respect to the amount of restitution.

Defendant now seeks, pursuant to 28 U.S.C. § 2255, to have this Court vacate his conviction and entire sentence. Defendant has three theories upon which he relies: 1.) that he is actually innocent of the crime to which he entered a plea of guilty; 2.) that before he entered his guilty plea, he was denied information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 3.) that his plea was not knowingly, intelligently, and voluntarily entered. The Government disagrees with all three theories.

**Ripeness**

As a preliminary matter, this Court must first discuss whether Defendant's motion is premature. "Ordinarily resort cannot be had to 28 U.S.C.A. § 2255 or habeas corpus while an appeal from conviction is pending." *Masters v Fide*, 353 F.2d 517, 518 (8th Cir. 1965). Other courts have phrased the test in the converse and held that "absent extraordinary circumstances, [a] district court should not consider § 2255 motions while a direct appeal is pending" because the disposition of the underlying case may render the motion moot. *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993). Defendant argues that there are extraordinary circumstances in this situation. The Government disagrees.

This Court must find that there are extraordinary circumstances in this case which warrant this Court

considering this motion. First, as discussed in more detail below, Defendant has already had one direct appeal. He did not raise these issues in that appeal. While Defendant may ultimately appeal this Court's sentence of restitution again if any is ordered, he likely would not be allowed to raise these new arguments at that time. Therefore, any further direct appeal is unlikely to result in this motion becoming moot.

Second, Defendant's probation period ended shortly after he filed this motion. In order to obtain relief pursuant to 28 U.S.C. § 2255, the movant must be "in custody." 28 U.S.C. § 2255. A probationer is in custody for purposes of 28 U.S.C. § 2255. *Borre v. United States*, 940 F.2d 215, 217 n.2 (7th Cir. 1991). Furthermore, if the movant's term of probation ends while the motion is pending, he may still pursue relief because a continuing injury is presumed *See Spencer v. Kemna*, 523 U.S. 1, 11-12 (1998). Defendant's claims are considered to be in controversy at this time. However, were this Court to dismiss this motion as premature now, then, when it later became ripe, Defendant would no longer be able to seek relief because he would not longer be "in custody" for 28 U.S.C. § 2255 purposes. Therefore, this Court believes that Defendant's later inability to raise these claims to be an extraordinary circumstance warranting consideration of them at this time.[1]

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1. This Court considered holding this motion in abeyance until it became ripe. However, as discussed in a separate Order, while this Court plans to move ahead with Defendant's resentencing, final resolution of his underlying criminal case is likely still months, if not years, away. Regardless of this Court's decision on the restitution issue at the resentencing hearing, an appeal is likely by the disagreeing

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*Appendix B*

**Procedural Default**

The Government contends that Defendant's claims are procedurally barred. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) (footnote omitted). Furthermore, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review . . . [because] [h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation omitted). "Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *Id.* (internal quotation omitted).

In the instant case, Defendant's only claim of error on appeal was that the restitution ordered by this Court was inadequately supported by the evidence and based on an incorrect interpretation of the tax laws. Each of Defendant's theories are based on Defendant's claims that his plea was based on a law which did not exist at the time of his actions. He claims that the fact that this law allegedly did not exist at

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party (or both parties). Furthermore, a petition for a writ of *certiorari* could be sought after the Eighth Circuit reached a decision on any subsequent appeal. This is to say nothing of the underlying civil tax case which appears to be many months, if not years, from resolution. This Court does not believe it would be a wise use of judicial resources to allow this motion to languish for that long.

the time of his actions makes it legally and factually impossible for him to have committed his crime. He also claims that his plea was invalid because the Government did not reveal the theory under which he was indicted in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He further claims that his plea was not knowing and intelligent because the Government did not reveal the theory under which he was indicted. Defendant's claims are unquestionably procedurally barred. At the very latest, Defendant knew the Government's theory of the case at the conclusion of his plea hearing. Even assuming that Defendant is correct that the Government was obligated to inform him of its legal theory, an assumption of which this Court is highly dubious, it does not explain why Defendant did not raise his claims in a motion to set aside his plea with this Court or in his appeal to the Eighth Circuit. This Court must find that Defendant's claims are procedurally barred.

**Excusing Procedural Default**

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley*, 523 U.S. at 622 (internal quotation omitted).

*Cause and Prejudice*

Defendant asserts two possible "causes" for his default. First, he asserts that the aforementioned alleged *Brady* violation caused his default. This contention is without merit. As explained above, the Government's theory of the case

was known to Defendant at least by the time his plea hearing concluded. This knowledge forecloses any claim that the alleged *Brady* violation caused him to not raise the issue by way of a motion to set aside his plea and/or in his appeal. The alleged *Brady* violation cannot excuse Defendant's default.

Second, Defendant asserts that his attorneys' failure to raise these issues on appeal amounts to ineffective assistance of counsel and was the cause of his default. The "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation omitted). This Court believes that Defendant's attorneys' failure to raise these issues was perfectly reasonable.

After this Court accepted Defendant's plea of guilty, the Government was allowed to dismiss the two other counts of the indictment pending against Defendant. At the sentencing hearing, the Court granted the Government's § 5K1.1 motion and gave Defendant a sentence of probation as requested by the Government. According to the Presentence Investigation Report, these actions reduced Defendant's exposure from a guideline range of forty-one to fifty-one months of imprisonment to a sentence of probation. Far from being ineffective assistance, Defendants' attorneys' actions were no doubt based on their concern that Defendant would expose himself to substantial prison time if he raised these issues on appeal. Furthermore, while not relied on in reaching its decision on this point, the Court would point out that

*Appendix B*

Defendant is a former attorney and never raised any objection to his plea at the time of his sentencing hearing or at any time prior to this motion. Ineffective assistance of counsel cannot excuse Defendant's default.

*Actual Innocence*

A defaulted claim "may still be reviewed in [a] collateral proceeding if [the movant] can establish that a constitutional error in his plea colloquy has probably resulted in the conviction of one who is actually innocent." *Bousley*, 523 U.S. at 623 (internal quotation omitted). "To establish actual innocence, [the movant] must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (internal quotation omitted). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Id.* "In other words, the Government is not limited to the existing record to rebut any showing that [the movant] might make[;] [r]ather . . . the Government [is] permitted to present any admissible evidence of [the movant's] guilt even if that evidence was not presented during [the movant's] plea colloquy. . . ." *Id.* "In cases where the Government has forgone more serious charges in the course of the plea bargaining, [the movant's] showing of actual innocence must also extend to those charges." *Id.*

Defendant claims he is actually innocent of the crime of which he was charged because it was legally and factually impossible for him to have committed it. As noted above, Defendant pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income

tax in violation of 18 U.S.C. § 371. This crime is commonly known as a "*Klein* conspiracy." *United States v. Fletcher*, 322 F.3d 508, 513 (8th Cir. 2003) (citing *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957)). "To convict a defendant of a *Klein* conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives." *Fletcher*, 322 F.3d at 513. Furthermore, a *Klein* conspiracy "need not result in a monetary loss to the federal government." *United States v. Anderson*, 579 F.2d 455, 458 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978). One particular case is particularly instructive

> Conspiracy to Defraud the United States.
>
> The [defendants] argue that a conspiracy as described does not constitute a conspiracy to defraud the United States because there is no proof of gain to them and no proof of harm to the United States. Further, they claim no fraudulent behavior occurred in connection with this conspiracy.
>
> Initially, we note that the charge is conspiracy to defraud, not an actual defrauding. Second, the cases clearly establish that a conspiracy to defraud the United States need not anticipate cheating the government out of property or money: To conspire to defraud the United States . . . also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected

> to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

*Hammerschmidt v United States*, 265 U.S. 182,188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924).

For example, *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), involved a conspiracy to submit false affidavits to the NLRB. The Court emphasized that section 371 "reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government'" *Id.* at 861, 86 S.Ct. at 1844 (quoting *Haas v. Henkel*, 216 U.S. 462, 479, 30 S.Ct. 249, 253, 54 L.Ed. 569 (1910)). *See also Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); *Haas v. Henkel*, 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569 (1910); *United States v. Anderson*, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651(1978); *United States v. Hay*, 527 F.2d 990 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct 1666, 48 L.Ed.2d 176 (1976); *United States v. Jacobs*, 475 F.2d 270, 283 (2d Cir.), *cert. denied*, 414 U.S. 821, 94 S.Ct 116, 38 L.Ed.2d 53 (1973). Anticipated pecuniary gain to the conspirators is also unnecessary.

The evidence must show a scheme to impair, obstruct, defeat or interfere with lawful governmental functions through fraudulent or dishonest means. The [defendants] argue there is no proof of such a scheme since all governmental work was performed.

*Appendix B*

In *United States* v. *Anderson*, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978), a judge, as financial officer of the county, approved his son's use of employees paid through federal Comprehensive Employment and Training Act (CETA) funds to perform some of the work on fencing projects the son performed on highway projects funded partially by the federal government.

The defendants there argued that there was no conspiracy to defraud since there was no interference with programs. A highway had been built for the cost anticipated, and workers had received federally funded employment as intended. The court rejected these arguments. "The defendants' actions . . . interfered with the government's interest in 'seeing that the entire project (was) administered honestly and efficiently and without corruption and waste.'" 579 F.2d at 458-59 (quoting *United States v Hay*, 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976)). Similarly, in *Langer v. United States*, 76 F.2d 817 (8th Cir. 1935), the court approved an indictment charging the Governor of North Dakota and others of conspiring to defraud the United States by requiring employees hired with federal funds to contribute five percent of their salaries to the Governor's political party for use in publishing a political newspaper. The court found that a conspiracy to defeat application of the funds to their statutory purposes was within the statute. Even if the salaries were not excessive, the court concluded the scheme

would obstruct administration because efficiency and morale might be lowered. *Id.* at 824.

*United States v. Pintar*, 630 F.2d 1270, 1277-78 (8th Cir. 1980).

In the instant case, Defendant argues that because he allegedly owed no income tax (an allegation the Government vigorously disputes) under the law in effect at that time, he cannot have been guilty of conspiring to defraud the IRS. Defendant's motion gives a thorough recitation of the evolution of the tax law in question. Essentially, his theory is that because a 1986 amendment and a 1988 amendment to 26 U.S.C. § 1374 applied to the transactions in question, he did not owe any tax and, therefore, did not defraud the IRS and could not have agreed to defraud the IRS. While these amendments have great relevance in the determination of Defendant's restitution amount, this Court believes that Defendant's attempt to use them to cast doubt on his guilt is without merit.[2]

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2. Defendant relies on *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998). In that case, the defendants' convictions for tax evasion were reversed because they actually did not owe the taxes as alleged by the government. *Id.* at 72-73. The Second Circuit also reversed the defendants' convictions for the alleged *Klein* conspiracy because, the court reasoned, if they "did not owe taxes on the diverted corporate income, then they cannot be guilty of defrauding the government *by not reporting the finds* on their personal tax returns." *Id.* at 73 n.6 (emphasis added). Had Defendant's only action in this case been the failure to include a particular class of income on his tax returns, the *D'Agostino* case would be more persuasive. However, in the present case Defendant devised a series of sham transactions and made fraudulent misrepresentations to the bankruptcy court actions which, unlike those in the *D'Agostino* case, were separate and apart from the filing of a tax return and, therefore, unrelated to the amount of tax owed (or not owed).

*Appendix B*

The case law cited above makes is abundantly clear that the Government need only show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives or, in other words, that Defendant engaged in a scheme to impair, obstruct, defeat, or interfere with lawful governmental functions through fraudulent or dishonest means. As the Eighth Circuit explained in its opinion, there was an agreement between, at least, Defendant Tucker and his co-Defendant William Marks to impair, obstruct, defeat, and interfere with the collection of taxes by the IRS. Furthermore, numerous overt acts were committed in furtherance of the agreement. To wit, Defendant "devised a series of sham transactions to minimize [his] tax liability" and made "misrepresentations to the bankruptcy court." *Tucker*, 217 F.3d at 961-62. The fact that Defendant and/or his tax attorney may have been mistaken as to the *need* to interfere with the collection of taxes by the IRS because his tax liability was actually lower than he believed does not change the fact that he agreed to interfere and committed fraudulent acts in furtherance of that interference.

Furthermore, even if the Government was also mistaken as to the amount of money it lost as a result of Defendant's actions, the case law is clear that an actual pecuniary loss is not a required element of a *Klein* conspiracy. Part of the confusion on this point stems from the fact that Defendant was not charged with income tax evasion. Had Defendant been so charged, this Court might agree that he could not evade a tax law for which he was not liable.[3] However, this is not the case here. Quite simply, Defendant and his

3. *See supra* note 2.

co-conspirator(s) agreed to *impair*, *obstruct*, *defeat*, *and interfere* with the collection of taxes by the IRS. Defendant did not plead guilty to evasion of income taxes. Defendant's participation in the sham bankruptcy at the very least impaired and interfered with the lawful function of the IRS. The fact that he may not have needed to so participate does not, however, alleviate his guilt. Having found that the record cannot support a claim of actual innocence, this Court must find that this exception cannot excuse Defendant's procedural default.

**The Merits Of The Motion**

While this Court has found that Defendant's motion is procedurally barred, it will briefly discuss the merits of Defendant's three theories for relief. First, Defendant's claim of legal impossibility is without merit as explained under the section above which discusses actual innocence.

Second, Defendant's claim that his guilty plea was not knowingly entered is without merit. As noted above, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley*, 523 U.S. at 621. Defendant made no such challenge in his appeal, nor did he move this Court to withdraw his guilty plea. Furthermore, Defendant's plea agreement as well as his comments during his plea hearing give plenty of evidence of the voluntary and knowing nature of the plea, and, as previously noted, he never moved to set the plea aside.

Third, Defendant's claim that the Government committed a Brady violation is without merit. "A knowing and intelligent guilty plea forecloses independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *United States v. Vaughan*, 13 F.3d 1186, 1187 (8th Cir.) (internal quotation omitted), *cert. denied*, 511 U.S. 1094 (1994). As noted above, Defendant's plea was knowing and intelligent. Therefore, any claims based on the deprivation caused by the alleged Brady violation cannot be reviewed.

Therefore, for the reasons stated above, Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc. No. 341) is DENIED and the motion is DISMISSED WITH PREJUDICE.[4]

IT IS SO ORDERED this 28th day of August 2003,

s/ [illegible]
UNITED STATES DISTRICT JUDGE

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4. Defendant, in his motion, requested a hearing on the motion. "[A]n evidentiary hearing is necessary only where the court is presented with some reason to question the evidence's credibility." *Kingsberry v. United States*, 202 F.3d 1030, 1033 (8th Cir.) (internal quotation omitted), *cert. denied*, 531 U.S. 829 (2000). The statute also makes it clear that a hearing is only necessary when the motion, files, and records of the case do not conclusively show that the movant is not entitled to relief. 28 U.S.C. § 2255. *See also* Fed. R. Governing § 2255 Proceedings 8(a) (stating that a court should "determine whether an evidentiary hearing is required"). This Court does not believe that Defendant's motion makes allegations which necessitate a hearing. The Court has rejected each of Defendant's claims on a legal rather than factual basis. Therefore, this Court does not believe a hearing would serve any useful purpose.

**APPENDIX C — JOINT STIPULATION AND MOTION FOR DECLARATION OF RESTITUTION AMOUNT DATED AND FILED DECEMBER 9, 2003**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No.4:95CR00117-001 SMR

UNITED STATES OF AMERICA

PLAINTIFF

vs.

JIM GUY TUCKER

DEFENDANT

**JOINT STIPULATION AND MOTION FOR DECLARATION OF RESTITUTION AMOUNT**

Comes the Plaintiff UNITED STATES OF AMERICA, and Defendant, JIM GUY TUCKER, by and through their respective attorneys, in response to the Court's Order dated August 28, 2003, for this Joint Stipulation for Declaration of the Amount of Restitution in the case. Plaintiff and Defendant, following the initial determination by the Internal Revenue Service, having reached an agreement on the maximum potential corporate tax owed by Cablevision Management, Inc. ("CMI"), in connection with the deemed sale of the Plantation Cable System assets, jointly represent and stipulate to the Court as follows:

*Appendix C*

1. That the Court previously entered an Order that Defendant would pay restitution in an amount equal to one-half (1/2) of the corporate tax liability of CMI as ultimately determined by the civil representatives of the Internal Revenue Service.

2. That the Internal Revenue Service ("IRS") issued a Notice of Proposed Deficiency dated February 25, 2002 ("Notice") against CMI in the amount of $125,429.88, representing the Internal Revenue Service's preliminary determination of CMI's maximum potential corporate tax liability for the "Built-in Gains" tax under 26 U.S.C. 1374, as amended by the Tax Reform Act of 1986 as effective January 1,1987 ("post-1986 Internal Revenue Code Section 1374"). One half of such liability would be $62,714.94.

3. That Defendant has previously deposited $100,000 (the "Deposit") with the Internal Revenue Service on or about April 17, 2000, and that the Deposit should be credited against the amount of restitution ordered in this case and ultimately applied against the final amount of the liability, if any, ultimately resolved by agreement or litigation between the Defendant and the Internal Revenue Service.

4. The parties disagree as to whether the restitution figure should include interest. If it is ultimately determined that CM has a tax liability for the "Built-in Gains" tax, then interest will be owed by Defendant on the final amount of such tax liability. As of December 9, 2003, if CMI's maximum potential corporate tax liability described in the Notice is sustained, then after taking into account a $100,000 deposit made on or about April 17, 2000 for purposes of

tolling further interest accruals on the tax liability of CMI, the sum of $107,038.51 would represent the amount of accrued and unpaid interest that would be due and owing on one-half of CME's maximum potential corporate tax liability.

5. The Government and Defendant acknowledge that the stipulations set forth herein are for restitution purposes only and are made without any admission on the part of or concession of any right of the Internal Revenue Service to adjust, or of CMI, and the Defendant to challenge, the proposed adjustments set forth in the Notice and the Government acknowledges that Defendant does not admit that any loss to the Government has occurred.

6. That any future modification in the amount of the tax liability of CMI, if any, is to be resolved by or between the Internal Revenue Service and the Defendant in the ordinary course of the Internal Revenue Service review and appeal process, or by litigation.

*Appendix C*

IN WITNESS WHEREOF, the Plaintiff and Defendant respectfully submit this Joint Stipulation and Motion for Declaration of Restitution this 9th day of December, 2003.

Respectfully submitted,

EILEEN J. O'CONNOR
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